Supreme Court, U.S.
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No. 96-514

In The

Supreme Court of the United States

October Term, 1996

DANIEL YAWCZAK,

Petitioner,

vs.

RUDI ACOSTA AND ALMA ACOSTA,

Respondents.

On Petition For Writ Of Certiorari
To The United States Circuit Court Of Appeals
For The Ninth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

A. Nature of the Case

This is a civil rights action arising out of the shooting death of Michael Acosta, age 21, son of plaintiffs-respondents Rudi and Alma Acosta. Michael was killed by defendant-petitioner San Francisco Police Inspector Daniel Yawczak on November 2, 1991.

Yawczak was off-duty and out of uniform at the time of the killing. He was standing by his car when he heard a woman scream and saw two young men running up the street carrying a purse. He drew his gun and chased them around the corner, where he saw them get into a car. Michael Acosta was sitting in the driver's seat of the car.

The facts of the encounter, including the facts and circumstances within Yawczak's knowledge at the time he fired his semi-automatic and the actions both Yawczak and Michael Acosta took or failed to take during the encounter at issue were disputed. It was undisputed, however, that Inspector Yawczak, acting under color of state law, fired two shots at Michael Acosta, killing him.

The question presented on the merits below was whether the shooting constituted a use of excessive force, in violation of the requirements of the Fourth Amendment to the United States Constitution. Also presented below by Yawczak as a defense was the question of whether Yawczak was entitled to qualified immunity.

B. Course of Proceedings and Disposition

Michael Acosta was killed on November 2, 1991. The complaint against Yawczak and others was filed on November 2, 1992, asserting civil rights violations and state law causes of action. Document 1, Excerpts of Record (1 ER).

Because facts relevant to qualified immunity were in dispute, summary judgment was not sought by Defendant Yawczak prior to trial. Neither was a motion to dismiss filed. *Opinion of the Court of Appeals for the Ninth Circuit* (*Opinion*), App. A to *Petition* (App.), p.13, n. 10.

The issue of liability was tried to a jury on May 4 through 10, 1994. The jury was properly instructed as to the standard of liability on the excessive force claim.[1] The

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[1] The jury was instructed to assess the reasonableness of the force used by Yawczak according to the excessive force standard articulated by this Court in *Graham v. Connor*, 490 U.S. 386, 396-97 (1989):

> The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The nature of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain and rapidly evolving. The reasonableness inquiry is an objective one: the question is whether the officer's actions are objectively reasonable in light of the facts and circumstances confronting him without regard to his underlying intent or motivation. An officer's "evil" intentions will not make a constitutional violation out of an objectively reasonable use of force; nor will an

jury rendered its verdict on May 10, 1994, answering "Yes" to the question, "Did Daniel Yawczak violate Michael Acosta's constitutional rights by using excessive force against him?" 110 ER 700:16-20, 87 ER.

Subsequent to the verdict, the trial court granted Yawczak's motion for judgment notwithstanding the verdict, pursuant to Federal Rules of Civil Procedure, Rule 50. App. B. As part of its decision granting Yawczak's motion for a directed verdict, the trial court prepared findings of its own contrary to those implicit in the jury

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officer's good intentions make an objectively unreasonable use of force constitutional.

The reasonableness of a particular use of force must be judged in light of the fact that a police officer has a right to use such force, including deadly force, as is necessary under the circumstances to protect himself and others from what he reasonably believes to be a threat of great bodily injury or harm.

If you find that at the moment Inspector Yawczak fired the first shot at Michael Acosta he reasonably believed that deadly force was necessary to protect himself or others from what he reasonably believed to be a threat of great bodily injury or harm, then I instruct you that his use of force was lawful and not excessive.

On the other hand, if you find that at the moment that he fired the first shot at Michael Acosta, Inspector Yawczak did not reasonably believe that deadly force was necessary to protect himself or others from what he reasonably believed to be a threat of great bodily injury or harm, then I instruct you that his use of force was excessive and unlawful.

Opinion, App. A, pp. 7-8, n. 3.

verdict. App. B, pp. 4-6. Based on these substitute findings, the trial court granted Yawczak qualified immunity. App. B, pp. 6-8, 12.

On appeal, the Court of Appeals for the Ninth Circuit reversed the trial court's grant of judgment notwithstanding the verdict. The Ninth Circuit reviewed the record in meticulous detail, and concluded that the jury's verdict was supported by sufficient evidence in the record.

The Ninth Circuit then went on to review the trial court's decision on qualified immunity. Because the court had found that the jury's findings were supported by sufficient evidence in the record, the court evaluated Yawczak's qualified immunity defense under the facts found by the jury. The Ninth Circuit concluded that, accepting the jury's version of the facts as to the actions taken by Yawczak and Acosta during the encounter and as to the circumstances within the knowledge of Yawczak at that time, Yawczak was not entitled to qualified immunity. *Opinion*, App. A, p. 16. The Court of Appeals, therefore, reversed the trial court's decision granting judgment in favor of Yawczak on qualified immunity.

Yawczak sought rehearing *en banc* by the Ninth Circuit. App. D. That request was denied with not a single judge requesting a vote on *en banc* rehearing. Yawczak then filed with this Court a *Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.*

C. Statement of Facts

This Statement of Facts identifies the undisputed facts below and summarizes the conflicting evidence confronting the jury on those facts which were in dispute below. The facts presented here differ significantly from those stated by counsel for Inspector Yawczak in his Statement of the Case. *Petition*, p. 3. Defendant-Petitioner Yawczak's facts statement relies exclusively on evidence supportive of the defendant's position. It fails to review the contrary evidence in the record which supports the jury's verdict in favor of the plaintiffs.

The Court of Appeals for the Ninth Circuit found that the following facts were not in dispute: On November 2, 1991 at 6:45 p.m., Yawczak, a San Francisco police officer who was off-duty and in plainclothes, was standing in front of his car in the Pacific Heights neighborhood of San Francisco when he heard a woman scream and saw two young men, Ernesto Pecson and Edwin Silva, running with what he believed to be a purse. 106 ER 122:11-13; 126:11-24; 106 ER 123:10-12; 106 ER 127:16-18. Yawczak drew his gun, a .45 caliber semiautomatic, and chased Pecson and Silva around the block. 106 ER 139:24-141:9; 142:21-25, 106 ER 126:22-127-127:2. After Pecson and Silva got into a waiting car, Yawczak fired two shots into the car, the first of which killed the driver, Michael Acosta. *Opinion*, App. A, p. 6. The car was parked on a slope, pointing downhill. 108 ER 419:23.

The Ninth Circuit found that the jury was faced with conflicting evidence regarding virtually all other factual issues. Among the disputed issues of fact were the following: whether one of the passengers in the car said

"Run him over" prior to Yawczak's first shot at Acosta; whether Yawczak saw Acosta move the car transmission lever into gear before he fired; whether the car was moving in the direction of Yawczak prior to the first shot; if the car was moving, how fast; and Yawczak's location at the time he fired the shots. *Opinion*, App. A, p. 10. The evidence on these disputed questions consisted of the testimony of Yawczak, the testimony of one of the suspects who survived the shooting, the testimony of three college students who happened to be standing nearby when the events at issue here occurred, the testimony of John Moragne, an eyewitness who viewed the scene from a second floor window, and the undisputed testimony of the medical examiner.

There was a direct conflict between the testimony of Yawczak and that of the eyewitnesses over Yawczak's demeanor and statements both before and after Yawczak approached the car. The college students and John Moragne, all disinterested eyewitnesses, agreed that Yawczak threatened the boys, yelling as he was chasing them some variation of, "I'll blow your fucking heads off." 107 ER 259:19-260:1; 107 ER 223:13-14; 107 ER 186:18-19; 187:19-20. Yawczak repeatedly and unequivocally denied making any threats to the suspects. He claimed that, while he was chasing the boys, he identified himself merely by saying "Freeze, police."

There was also a direct conflict between the testimony of Yawczak and that of the eyewitnesses over what was said after Yawczak approached the car. Yawczak claimed that one of the suspects poked Michael Acosta and said "Run him over." 108 ER 408:5-8. Pecson, one of the suspects chased by Yawczak, testified that "no way"

did anyone in the car say anything like that. 109 ER 608:23-609:8. Pecson stated that before Yawczak arrived at the car, the suspects said, "Go. Hurry up." 109 ER 599:8-9. However, once they saw Yawczak at the car pointing a gun at them, no one in the car said a word. 109 ER 599:17-21.

There was also direct conflict between Yawczak and the eyewitnesses about whether Yawczak watched Michael Acosta move the car into gear. Yawczak claimed that he was standing dead-center in front of the car, that he watched Michael Acosta move the gear shift from park to drive, that the car then began to move, that it hit him, that he flattened out on the hood, that he fired a first shot at the driver from the hood, rolled off the hood into a seated position and fired a second shot. 108 ER 408:12-15. Yawczak's testimony that he saw Michael Acosta put the car in gear while he was standing directly in front of the car was contradicted by Pecson. Pecson testified that the car was already in gear by the time he got in, which was before Yawczak reached the car. 109 ER 603:18. Further, the defendant's photographic evidence, D's Ex. W-1-5; 47, revealed that the gear shift rested well below the level of the dashboard and was, therefore, not visible even in its highest position.

Yawczak's testimony that the car moved forward and hit him before he fired a shot, that he flattened out on the hood, fired his gun at the driver, that he rolled off the hood and fired a second shot from a seated position was directly contradicted by disinterested eyewitnesses. 108 ER 408:12-15; 106 ER 152:13-21; 153:7-13.

First, there was evidence in the record that the car did not move at all prior to the first shot being fired. This

testimony included the accounts of disinterested eyewitnesses – three students walking down the street at the time of the incident. 107 ER 194:9-12. (Rothberg testified she was "positive" the car did not move prior to the first shot); 107 ER 220:23-25; 107 ER 225:4-5; 107 ER 232:2-8 (Martinusen testified that she stopped, heard the gunshot and then ran, and that she never saw the car move). However, the Ninth Circuit discounted this testimony, concluding that the witnesses' testimony was based on what they heard, rather than direct visual observation. *Opinion*, App. A, p. 11.

The evidence on which the jury properly relied, according the Ninth Circuit, was the testimony of Pecson that, although the car may have moved before Yawczak fired, any such movement consisted of a slow roll forward due to the placement of the car on a hill. *Opinion*, App. A, p. 12, text and n. 8, at 15; 109 ER 600:4-14; 606:17-18 (Pecson testified the car moved "just a little; just a little movement"). This testimony was consistent with the testimony of the students described above.

The testimony on Yawczak's location at the time the shots were fired was also disputed. As noted above, Yawczak testified that he was standing directly in front of the car, that the car began to move, that it hit him before he fired, that he fired flattened out on the hood, and that he rolled off the front of the hood, landing on his buttocks before firing again. Pecson, one of the two suspects, testified, in contrast, that the car moved slightly prior to the first shot, but did not touch Yawczak, because it was going "way too slow." 109 ER 600:4-10; 109 ER 607:22-24. Rather, Yawczak "moved aside and let the car roll down slowly." 109 ER 601:1-2. A disinterested witness, John

Moragne, who was watching from a second floor window, emphatically testified that Yawczak stepped to the side of the car and was standing off to the side when he fired one of the shots. 109 ER 567:2-4, 5-6. This testimony was in direct conflict with Yawczak's version of the killing.

The medical examiner testified that Yawczak's account of having fired a second shot from a seated position after rolling of the hood was inconsistent with the physical evidence. 106 ER 87:10-11; 89:12-18; 106 ER 85:24-25; 106 ER 77:5-8; 109 ER 601:2-4.

Finally, the Court of Appeals pointed out that the jury was also presented with evidence that Yawczak had changed his account of the shooting in numerous respects twice prior to trial, raising additional significant issues of credibility for the jury to resolve. *Opinion*, App. A, p. 15, text and n. 12 (Court notes that "it is highly likely that the jury developed serious doubts regarding Yawczak's veracity"; 106 ER 152:1-12; 108 ER 435:5-9.

Based on a careful review of the disputed evidence in the record, catalogued here in part, the Ninth Circuit concluded that:

> On the basis of the evidence presented at trial, the jury could have reasonably concluded that a reasonable officer, who had positioned himself facing the driver so that he was standing closer to the side than the dead-center of the car, would have recognized that he could avoid being injured when the car moved slowly, by simply stepping to the side. In short, a juror could have reasonably reached the conclusion at which the jury appears to have arrived; that the

> car did move prior to Yawczak's shooting Acosta but that it was moving or rolling sufficiently slowly that a reasonable officer in Yawczak's position would not have perceived himself to be in danger of serious bodily harm. [footnotes omitted].

Opinion, App. A, at 12.

II. REASONS FOR DENYING THIS WRIT

A. The Questions Presented to This Court for Review Misstate the Record

Petitioner's first question presented for review if this Court were to grant a writ of certiorari states as follows:

> 1. For purposes of qualified immunity, is the law clearly established that a police officer: (a) has identified himself emphatically and repeatedly as a police officer; (b) is standing directly and immediately in front of a car containing fleeing felons; (c) has his gun drawn and pointed at the car's driver; (d) has ordered repeatedly the occupants of the car to freeze; (e) hears the felons urge the driver to hurry away; (f) sees the driver put the car into gear; and (g) in the next instant sees the car move forward toward him?

Petition, at i.

Question two asks:

> 2. Could a reasonable officer have believed even if mistakenly that the use of deadly force was necessary, appropriate and lawful under those circumstances?

Petitioner's statement of facts found at pages 3-4 of the *Petition*, and the questions presented for review by this Court, found at page i of the *Petition*, present as though they are undisputed, facts which are in direct conflict with the facts in this matter as found by the jury, and determined by the Ninth Circuit to be supported by legally sufficient evidence in the record.[2] Moreover, the facts presented to this Court by Petitioner as the predicate for his *Petition for Writ of Certiorari* on questions involving qualified immunity are not the facts relied upon by the Ninth Circuit in making the ruling on qualified immunity which Petitioner challenges. The Ninth Circuit relied upon the facts found by the jury, summarized in the Statement of Facts in section I above. Thus, Petitioner has misstated the facts.

As noted in section I above, the Court of Appeals held that the jury had properly found that Inspector Yawczak, (a) rather than standing directly and immediately in front of the car had positioned himself so that he was standing closer to the side than the dead-center of the car; (b) did not hear the passengers urge the driver to hurry away because this statement was not made in the officer's presence, (c) did not see Michael Acosta put the car in gear during the confrontation; and (d) reasonably

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[2] Petitioners present the facts as though the Ninth Circuit reversed a jury verdict in their favor, rather than upholding the verdict of the jury and reversing the court's grant of judgment notwithstanding the verdict. In reviewing a judgment notwithstanding the verdict, the evidence must be viewed in the light most favorable to the non-moving party. *Cockrum v. Whitney*, 479 F.2d 84, 85 (9th Cir. 1973). Petitioner's facts statement utterly fails to meet this standard.

should have realized that because the car rolled so slowly forward from a dead standstill, he easily could avoid being injured by simply stepping to the side. *Opinion*, App. A, p.12. Moreover, the record is void of any evidence that Michael Acosta was a "fleeing felon."

Before reaching the questions which Petitioner claims are presented to this Court on certiorari, this Court would have to first reverse the Court of Appeals' decision that the evidence in the record was sufficient to support the jury's verdict, reinstate the trial court's judgment notwithstanding the verdict, and reinstate the trial court's substitute findings. Only then would the first two questions raised by the Petitioner arguably be before this Court.

Because the questions raised in the *Petition* would not properly be before this Court even if a writ of certiorari was granted, issuance of the writ should be denied.

B. The Ninth Circuit Properly Stated and Properly Applied the Law of Qualified Immunity to the Facts Found by the Jury

In explaining the reasons for granting certiorari in this matter, Petitioner argues that the Ninth Circuit has applied an improper qualified immunity analysis which equates the analysis for qualified immunity in a Fourth Amendment excessive force case with that for liability on the merits. Petitioner Yawczak contends that this alleged failure to separate the decision on the merits from the decision on qualified immunity violates the directives of this Court set forth in *Anderson v. Creighton*, 483 U.S. 636 (1987) and *Hunter v. Bryant*, 502 U.S. 335 (1991).

Contrary to Petitioner's assertions, the Ninth Circuit has both properly stated the applicable rules of law and properly applied those rules to the facts as found by the jury below.

Petitioner, at page 8 of the *Petition*, concedes that the Ninth Circuit correctly stated the two factors which must be considered in determining whether a law enforcement officer is entitled to qualified immunity: (1) Was the law governing the officer's conduct clearly established? (2) Under that law, could a reasonable officer have believed that his conduct was lawful? *See Opinion*, App. A, p.13.

Under the first prong of this test, the Ninth Circuit properly concluded that the law governing when an officer may use deadly force against an unarmed fleeing suspect was clearly established at the time of Acosta's shooting. It is well-settled that an officer's use of deadly force is reasonable only if "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others" and that, in applying this standard, the court must evaluate the objective reasonableness of the officer's conduct under the circumstances. *Tennessee v. Garner*, 471 U.S. 1, 3 (1985); *Graham v. Connor*, 490 U.S. 386, 396-97 (1989).

Under the second prong of this test, the Ninth Circuit applied the stated test to the factual findings implicit in the jury's verdict. The Court properly concluded that, where, as here, facts are in dispute, "the jury, not the judge, must decide the disputed 'foundational' or 'historical' facts that underlie the [qualified immunity] determination." *Opinion*, App. A, p.14.

Where the facts either about what the officer or the claimant did or failed to do or about the facts and circumstances within the officer's knowledge at the time of the shooting are disputed, it is settled law that the trial court cannot resolve the question of immunity prior to trial. The case must be tried and the foundational or historical facts found by the jury must then be applied by the court in making a determination on qualified immunity under the legal standard set out above. *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151, 1257 (1995) (where facts are in dispute either about what happened or about the officer's knowledge, a genuine issue for trial exists and qualified immunity cannot be determined until the factual disputes are resolved by the jury at trial).

Consistent with these principles of law, the Ninth Circuit, in this case where facts were in dispute, looked to the jury's resolution of the necessary foundational questions. As a preliminary matter, the court determined that the jury's findings were supported by sufficient evidence in the record and, on this basis, reversed the trial court's grant of judgment notwithstanding the verdict. The court then went on to evaluate whether Yawczak was entitled to qualified immunity based on the findings implicit in the jury verdict. *Opinion*, App. A, p.14.

As this Court acknowledged in its opinion in *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151, 1257 (1995), where qualified immunity turns on fact-related legal issues, as a practical matter, the claim of qualified immunity often becomes intertwined with the merits. This is because such fact-related questions are often the very same questions that underlie the plaintiff's claim on the merits. This is the case here. The resolution of the disputed facts – (1)

whether the car was moving and, if so, whether it was accelerating or merely rolling forward very slowly; (2) whether Yawczak had heard the occupants of the car threaten him; (3) whether Yawczak was standing to one side, easily able to move out of harm's way; (4) Yawczak's location when he fired the first shot; (5) Yawczak's location when he fired the second shot; (6) whether Yawczak made threatening statements and acted in a threatening manner throughout the encounter – these were the key questions below both in resolving liability on the merits and in evaluating the question of qualified immunity. So long as the Ninth Circuit applied the correct legal standard, there is no error simply because, as a practical matter, the claim of immunity turns on the very same disputed factual questions which also were essential to resolve plaintiffs' claim on the merits.

Finally, it is important to note here that this is not a case where a trial could have been avoided by resolving the question of qualified immunity at an early stage of the proceedings. As the Ninth Circuit notes, here the defendants did not ask the trial court to decide the immunity issue on summary judgment because it was clear from the outset that qualified immunity could only be decided after disputes were resolved as to the facts and circumstances within Yawczak's knowledge and as to what Yawczak and Acosta actually did. *Opinion*, App. A, p. 13, n. 10.

C. An Alleged Conflict Within a Circuit is Not a Proper Basis to Grant Certiorari

As an additional ground for grant of a writ of certiorari in this matter, Petitioner alleges that the Ninth Circuit opinion in this matter conflicts with other qualified immunity decisions in the Ninth Circuit.

First, Petitioner is mistaken. Petitioner focuses on a perceived distinction in the degree to which the Ninth Circuit identifies the decision on qualified immunity as separate and distinct from the decision on the merits in excessive force cases. A review of the Ninth Circuit decisions cited by the Petitioner in this matter (*Petition*, p.20) shows them to be consistent with the decision of the panel here on all relevant points.

To the extent any difference in emphasis exists among the decisions cited, that difference is attributable to the fact that a number of the cases relied on by Petitioner are cases where resolution of defendants' entitlement to qualified immunity was properly resolved before trial, on summary judgment. *See Reynolds v. County of San Diego*, 84 F.3d 1162, 1168 (9th Cir. 1986). As explained in section B above, this Court has recognized that, as a practical matter, where the immunity inquiry does not depend on essentially legal questions appropriate for summary judgment, but instead turns on disputed questions of fact, the decision on the merits and the decision on qualified immunity often become intertwined. *Johnson v. Jones*, ___ U.S. ___, 115 S.Ct. 2151, 2156 (1995). This is because both the resolution of the merits and qualified immunity turn on the resolution of the same disputed facts. *See Reynolds*, 84 F.3d at 1168 (distinguishes cases

which must go to trial because facts are in dispute from summary judgment cases where, pursuant to this Court's decision in *Hunter v. Bryant*, 502 U.S. at 228, qualified immunity questions should be decided at the earliest possible moment).

Second, even assuming that some conflict could be identified, a conflict within a single circuit is not a valid reason for this Court to grant a writ of certiorari. Supreme Court Rule 10 (1995). Procedures within the Ninth Circuit allow that court without the intervention of the Supreme Court, to resolve any inconsistencies between panels. Indeed, defendants below did seek rehearing *en banc* before the Ninth Circuit. Not a single judge of the court requested a vote on rehearing *en banc*. App. D, p.1.

D. Whether the Ninth Circuit Properly Exercised Its Discretion in Denying Petitioner's Motion for a New Trial is Not an Important Federal Question, Appropriate for Review by this Court

Petitioner challenges, as question five in its list of questions presented for review by this Court, the decision of the Ninth Circuit not to remand for a new trial after reversing the grant of judgment notwithstanding the verdict. Instead, the court determined that the facts found by the jury were clear enough to allow the court to decide the qualified immunity issue without remand for a new trial. This decision is well within the discretion vested in the court. *See Frank Briscoe, Co., Inc. v. Clark County*, 857 F.2d 606, 614 (9th Cir. 1988), *cert. denied*, 490 U.S. 1048

(1989). Most importantly, the Ninth Circuit's exercise of its discretion not to remand for a new trial raises no important or compelling unresolved question of federal law appropriate for decision by this Court. Supreme Court Rule 10 (1995).

III. CONCLUSION

Because this matter presents no important unresolved federal question for resolution by this Court and because the judgment of the Ninth Circuit is consistent with the relevant decisions of this Court, Respondents respectfully request that this Court deny the petition for writ of certiorari in this matter.

Dated: October 30, 1996

Respectfully submitted,

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